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CITATIONS

Cases:

475-014—72——1

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge district court (App. A, *infra*, pp. 1a–23a) is reported at 340 F. Supp. 903.

JURISDICTION

The judgment of the three-judge district court (App. B, *infra*, p. 24a) was entered on March 30, 1972. A notice of appeal to this Court (App. C, *infra*, pp. 25a–26a) was filed on May 1, 1972. On June 22, 1972, Mr. Justice Powell extended the time for docketing the appeal to and including August 29, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

The government instituted this action seeking: (1) a declaration that a statewide regulation was void because unconstitutional, (2) an injunction against state officials restraining the regulation, taxation, or control of purchases of alcoholic beverages by instrumentalities of the government, and (3) a judgment for the amount previously paid under protest pursuant to the challenged regulation. Accordingly, a three-judge district court was properly convened pursuant to 28 U.S.C. 2281, *King* v. *Smith,* 392 U.S. 309, 312 n. 3, and a direct appeal to this Court is authorized by 28 U.S.C. 1253.

QUESTIONS PRESENTED

A regulation of the Mississippi State Tax Commission requires out-of-state liquor distillers and suppliers to collect "wholesale markups" on liquor sold to military officers' clubs and other nonappropriated fund activities located on bases within Mississippi and to remit these "markups" to the Tax Commission. The questions presented are:

1. Whether Mississippi can apply this regulation with respect to military bases over which the jurisdiction of the United States is exclusive; and

2. Whether, with respect to military bases over which federal and state jurisdiction is concurrent, the regulation imposes an unconstitutional state tax on the government or is an unconstitutional interference with military procurement.

CONSTITUTIONAL PROVISIONS, STATUTE, AND REGULATION INVOLVED

Article I, section 8 provides in part:

> The Congress shall have Power * * *

To raise and support Armies, * * *

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

* * * * *

To exercise exclusive Legislation in all Cases whatsoever * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings * * *.

Article IV, section 3 provides in part:

To exercise exclusive Legislation in all Cases and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *.

Section 2 of the Twenty-first Amendment provides:

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 10265–18(c) of the Mississippi Local Option Alcoholic Beverage Control Law provides:

The State Tax Commission is hereby created a wholesale distributor and seller of alcoholic beverage, not including malt liquors, within the State of Mississippi. It is granted the sole right to import and sell such intoxicating liquors at wholesale within the State, and no person who is granted the right to sell, distribute, or receive such liquors at retail shall purchase any such intoxicating liquors from any source other than the Commission. The said Commission

may establish warehouses, purchase intoxicating liquors in such quantities and from such sources as it may deem desirable and sell the same to authorized retailers within the State including, at the discretion of the Commission, any retail distributors operating within any military post or qualified resort areas within the boundaries of the State, keeping a correct and accurate record of all such transactions, and exercising such control over the distribution of alcoholic beverages as seem right and proper in keeping with the provisions and purposes of this act.

Regulation 25 of the Mississippi State Tax Commission provides:

> Post exchanges, ship stores, and officers' clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller or from the Alcoholic Beverage Control Division of the State Tax Commission. In the event an order is placed by such organization directly with a distiller, a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.
>
> All orders of such organizations shall bear the usual wholesale markup in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller, which shall in turn remit the wholesale markup to the Alcoholic Beverage Control Division of the

State Tax Commission monthly covering shipments made for the previous month.

STATEMENT

The material facts are not in dispute.[1] Mississippi prohibited the sale or possession of alcoholic beverages until 1966. In that year, it adopted a local (county) option policy subject to the requirement that the State Tax Commission be the sole importer and wholesaler of alcoholic beverages. Miss. Code Ann. 10265–01, *et seq.* The Commission was authorized to sell to retailers in the state "including, at the discretion of the Commission, any retail distributors operating within any military post * * * within the boundaries of the State * * * exercising such control over the distribution of alcoholic beverages as seem [*sic*] right and proper in keeping with the provisions and purposes of this act." Miss. Code Ann. 10265–18(c).

Pursuant to this statute, the Commission promulgated Regulation 25 (originally numbered 22), which authorizes military post exchanges, ship stores, and officers' clubs to purchase liquor either from the Commission or directly from distillers. The regulation requires, on direct orders from such military facilities, that distillers collect and remit to the Commission the Commission's "usual wholesale markup." During the period in issue, the wholesale markup was 17 percent on distilled spirits and 20 percent on wine (App. A, p. 4a).

[1] The case was submitted on a stipulation of facts (App. D, *infra*, pp. 27a–44a).

The officers' and noncommissioned officers' clubs and other nonappropriated fund activities on four military bases in Mississippi had purchased liquor from distillers and suppliers when Mississippi was a "dry" state, and they decided to continue this practice rather than purchase from the Commission (App. D, p. 37a). Two of these bases, Keesler Air Force Base and the Naval Construction Battalion Center, are enclaves of federal jurisdiction over which Mississippi retained only the right to serve civil and criminal process. Miss. Code Ann. 4154 (App. A, pp. 3a, 7a). On the other two bases, Columbus Air Force Base and Meridian Naval Air Station, the federal government and the State exercise concurrent jurisdiction (App. A, p. 3a; App. D, p. 29a).

Soon after the Mississippi regulation became effective, the military authorities commenced discussions with state officials in an unsuccessful effort to persuade them that the collection of the "markup" was improper. The military authorities also attempted to pay the amounts for the "markup" into an escrow fund until the matter could be judicially determined. The Commission, however, notified the distillers that if they did not remit the "markups" on their military sales to the Commission, the distillers would be subject to criminal prosecution (see Miss. Code Ann. 10265–112) and to delisting, *i.e.*, loss of the privilege of selling to the Commission for retailing in Mississippi (App. D, pp. 38a–40a). To obtain liquor, therefore, the military facilities were required by the distillers to pay the "markup." By July 31, 1971, $648,-

421.92 had been paid under protest to suppliers outside Mississippi for such "markups" (App. D, p. 40a).

The United States instituted this action on November 3, 1969, seeking a declaration that the regulation is unconstitutional and an injunction against its continued enforcement, and seeking to recover the amount already paid for "markups."

The district court granted summary judgment against the government. It held that the constitutional grants to Congress regarding military forces and property belonging to the United States "are diminished by the express prohibition of the XXI Amendment as to all packaged liquor transactions which (1) are made on exclusively federal enclaves but without restriction upon use and consumption of such liquors outside the base, or (2) take place on military installations over which the state and federal government exercise concurrent jurisdiction" (App. A, p. 2a). With respect to liquor sold by the drink on the four bases, the court made no express holding, but its judgment denied all relief to the government. Judge Cox joined the court's opinion and added in a concurring opinion that a refund of the "markup" was also barred because those payments had been voluntarily made (App. A, pp. 13a–23a).

THE QUESTIONS ARE SUBSTANTIAL

The district court's decision squarely presents a substantial issue: whether the constitutional grants of congressional authority over enclaves of exclusively federal jurisdiction are diminished by the Twenty-first Amendment. In addition, the enforcement of Mis-

sissippi's regulation as it affects the military facilities on all four bases raises substantial questions concerning the accommodation of state authority under the Twenty-first Amendment, on the one hand, with governmental immunity from state taxation and federal control of military procurement, on the other hand. The resolution of these issues has significant practical importance not only in Mississippi, which has already collected over $648,000 pursuant to the contested regulation, but also in other states that might follow Mississippi's lead in attempting to regulate liquor sold on federal enclaves or military bases.

1. Section 2 of the Twenty-first Amendment prohibits the "transportation or importation" of liquor "into any State * * * for delivery or use therein" in violation of state law. This Court has held the Amendment inapplicable to liquor destined for and sold within exclusively federal enclaves. *Collins* v. *Yosemite Park Co.*, 304 U.S. 518; *Johnson* v. *Yellow Cab Co.*, 321 U.S. 383.[2]

The court below correctly recognized that the Twenty-first Amendment did not increase a state's territorial jurisdiction and that as federal enclaves the Keesler and Naval Construction bases "are to Mississippi as the territory of one of her sister states"

[2] Article IV, section 3, gives Congress the power to regulate federal enclaves, and Article I, section 8, clause 16, gives Congress authority "To exercise exclusive Legislation in all Cases whatsoever * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; * * *."

(App. A, p. 7a). The court nevertheless held that, because some undetermined amount of liquor purchased by the military and sold on the bases is consumed in Mississippi,[3] the State could under the Twenty-first Amendment impose the "wholesale markup" charge on *all* liquor purchased by the facilities.

This holding rests on two faulty premises: that the transaction between the distiller and the military facility involves importation "into any state," and that the liquor thus imported is "used" in Mississippi, within the meaning of those terms of the Twenty-first Amendment. This Court in *Collins* v. *Yosemite Park Co., supra,* held that the importation of out-of-state liquor for delivery and sale within Yosemite National Park was not importation "into California within the meaning of the Twenty-first Amendment" (304 U.S. at 535). See also *Johnson* v. *Yellow Cab Co., supra,* involving transportation of liquor through Oklahoma to Fort Sill Military Reservation. The court below sought to distinguish *Collins* on the ground that there the "delivery and use [was] in the Park" (304 U.S. at 538), whereas here the liquor is consumed off base. It is clear, however, that the "use" made of liquor by a retailer is its sale, not consumption, and

[3] Liquor sold by the drink is, of course, ordinarily consumed on the premises. The record contains nothing concerning the extent to which packaged liquor is consumed elsewhere than on the bases. The district court inferred that some of the liquor is consumed off base because limited classes of nonmilitary persons are authorized to make purchases and because each selling facility exacts from purchasers a promise to obey state laws with respect to liquor consumed off base (App. A, p. 3a).

that it was in this sense that the Court used the word in *Collins*.

The transaction between the distiller and the military facility is therefore not itself subject to regulation under the Twenty-first Amendment. Nor is there basis in this record for an assertion—not expressed by the court below—that the "markup" on the distiller-retailer transaction is the only effective means of regulating the subsequent importation and use (consumption) by individual purchasers.[5] And even if the record demonstrated such a need, it is difficult to see why that would justify an otherwise impermissible extension of Mississippi's territorial jurisdiction. Surely if the liquor were being transported from Tennessee through Mississippi for delivery and sale by retailers in Louisiana, Mississippi would not and could not impose a "markup" on those transactions simply

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[4] The record in *Collins*, like the record here, did not reveal the extent to which liquor sold on the federal lands was consumed in the state. But the complaint in *Collins* acknowledged that liquor was sold "for consumption on or off the premises where sold" (Transcript of Record, p. 3, No. 870, O.T. 1937), and there is no reason to think that some was not consumed outside the park and in California. Thus, this Court's statement in *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332, that the shipment in *Collins* was "destined for distribution and consumption in a national park," apparently used the word "consumption" in the broad sense of retail purchase of consumer goods.

[5] There is even less foundation for the apparent assumption of the court below that regulation of the liquor actually consumed in Mississippi requires a "markup" on all liquor purchased for sale on the bases, including liquor sold by the drink and packaged liquor consumed on the base.

because some of the liquor will be brought by individual purchasers into Mississippi for consumption. Instead, Mississippi would be limited to regulating the actual importation into the state by the individual purchasers, even if there were no fully effective means of doing so.

Likewise, Mississippi is here free under the Twenty-first Amendment to establish a regulatory mechanism to ensure that liquor actually taken from the bases is subjected to the "markup" charge. It is not free to interfere with the sale and delivery of out-of-state liquor to facilities on the federal enclaves, and the court below erred in so holding.[6]

2. Even if the court below correctly applied the Twenty-first Amendment, the "wholesale markup" charges, as they affect all four military bases, are impermissible for another reason. Although its terms suggest a price regulation, the Mississippi requirement that distillers collect "markups" of 17 or 20 percent from the military facilities and remit those

[6] Although the Twenty-first Amendment is inapplicable to liquor shipments destined for federal enclaves, Mississippi can exercise its police power to regulate such shipments while they are passing through her territory. *Duckworth* v. *Arkansas*, 314 U.S. 390; *Carter* v. *Virginia*, 321 U.S. 131. To be valid, however, such police regulation must be "in the interest of preventing * * * unlawful diversion [of the liquor] into the internal commerce of the State." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 333. Here, as in *Idlewild*, there is no evidence that any liquor has been diverted, and there is no claim that such diversion is the basis of the "markup" requirement.

amounts to the State Tax Commission is a state tax on instrumentalities of the government.[7]

The "usual wholesale markup" is collected by the Tax Commission not in return for any services with respect to the liquor sold to the military facilities (App. D, p. 38a), but rather as "an enforced contribution to provide for the support of government." *United States* v. *LaFranca,* 282 U.S. 568, 572. Profits from the collection of the "markups" go into Mississippi's general revenues.[8] The regulation cannot be regarded as a tax upon the distillers rather than upon the military facilities. The regulation explicitly provides that the price to the military must include the "markup," which the distiller merely remits to the Commission. In this respect, the tax resembles the common sales or use tax that states collect through retailers, such as the tax struck down in *Agricultural National Bank* v. *State Tax Commission,* 392 U.S. 339.

Accordingly, the Mississippi regulation can be sustained only if the doctrine of governmental tax immunity, which is founded upon constitutional principles, *M'Culloch* v. *Maryland,* 4 Wheat. 316, 426, is subordinate to the power of the states to regulate

[7] The officers' clubs and other nonappropriated fund activities which pay the Mississippi tax are instrumentalities of the government for purposes of the tax immunity doctrine. See *Standard Oil Co.* v. *Johnson,* 316 U.S. 481; 5 U.S.C. 2105(c).

[8] Memorandum in Support of Defendants' Motion for Summary Judgment, pp. 4–5.

liquor pursuant to the Twenty-first Amendment. This important issue has never been decided by this Court.[9]

3. Enforcement of the regulation on military bases also presumes that the state's authority under the Twenty-first Amendment displaces the federal authority under Article I to regulate military procurement. Pursuant to Article I, Congress authorized the Secretary of Defense to regulate "the sale, consumption, possession of or traffic in" liquor to or by servicemen at or near military bases. 50 U.S.C. App. 473. Implementing this statute, 32 C.F.R. 261.4(c)[10] provides that "the purchase of all alcoholic beverages for resale at any * * * base * * * shall be in such a manner and under such conditions as shall obtain for the Government

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[9] Governmental tax immunity is not based on "a constitutional provision which flatly prohibits any State from imposing a tax * * *," as in *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341, 344. It is, however, rooted in the fundamental concept of federalism, *M'Culloch* v. *Maryland*, 4 Wheat. 316, 426, and is thus unlike the "generalized authority given to Congress by the Commerce Clause." *Beam*, *supra*, 377 U.S. at 344.

[10] The regulation provides:

> *Cooperation.* (1) DoD will cooperate with all duly constituted regulatory officials (local, state and Federal) to the degree that the duties of such officials are related to the furtherance of the terms of this part. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base or other place primarily occupied by members of the Armed Forces within the United States shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered.
>
> (2) This policy of cooperation is not to be construed or represented as an admission of any legal obligation to submit to State control.

the most advantageous contract, price and other factors considered."

This federal policy is impeded by the Mississippi Commission's requirement that out-of-state distillers collect 17 or 20 percent more than they otherwise would on liquor contracts negotiated with the military facilities. Unless protected by the Twenty-first Amendment, state regulations which conflict with federal military procurement regulations are invalid. See *Public Utilities Commission* v. *United States,* 355 U.S. 534; *Paul* v. *United States,* 371 U.S. 245. Thus, the decision below also raises the substantial constitutional issue, which this Court has not previously resolved, whether a state's authority to regulate liquor pursuant to the Twenty-first Amendment takes precedence over the federal authority to regulate military procurement pursuant to Article I.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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AUGUST 1972.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

(Civil Action No. 4554)

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI; ARNY RHODEN, CHAIRMAN; JIMMY WALKER, EXCISE COMMISSIONER; WOODLEY CARR, AD VALOREM COMMISSIONER; KENNETH STEWART, DIRECTOR OF THE ALCOHOLIC BEVERAGE CONTROL DIVISION, MISSISSIPPI STATE TAX COMMISSION; A. F. SUMMER, ATTORNEY GENERAL, STATE OF MISSISSIPPI; AND THE STATE OF MISSISSIPPI, DEFENDANTS

Filed March 24, 1972, Southern District of Mississippi.

ROBERT C. THOMAS, *Clerk.*

475-014—72——3

Before CLARK, *Circuit Judge;* RUSSELL, *Chief District Judge;* and COX, *District Judge.*

CLARK, *Circuit Judge*:

This court must harmonize the constitutional grant of power, on the one hand, to Congress to make rules for the government and regulation of the Armed Services and to legislate with regard to lands purchased for military bases with the prohibition on power, on the other hand, contained in the XXI Amendment, to transport or import intoxicating liquors into a state for delivery *or use therein* in violation of state law. Since both the affirmative and negative provisos are parts of the supreme law of the land, the relative status of the two sovereigns involved in this collision of claimed authority becomes immaterial. Rather, we must reconcile the power granted with the power prohibited. Reduced to its simplest terms, our ultimate holding is that the general article I, § 8 and article IV, § 3, clause 2 grants to the Congress of legislative and regulatory powers are diminished by the express prohibition of the XXI Amendment as to all packaged liquor transactions which (1) are made on exclusively federal enclaves but without restriction upon use and consumption of such liquors outside the base, or (2) take place on military installations over which the state and federal government exercise concurrent jurisdiction.

The United States filed this action seeking declaratory and injunctive relief against enforcement of a statewide regulation requiring distillers and suppliers of alcoholic beverages to collect, over and above the purchase price, a percentage sum designated as a wholesale mark-up on their liquor sales to certain military organizations located on bases in the State of Mississippi. In addition, the United States sought to

recover the total of all such payments made by these military purchasers. Jurisdiction of the action is founded on 28 U.S.C.A. §§ 1345 and 2281. The matter comes on for disposition on cross motions for summary judgment based upon interrogatories and answers and a stipulation of facts.

The State of Mississippi ceded and the United States acquired exclusive jurisdiction over lands within the state comprising Keesler Air Force Base and the United States Naval Construction Battalion Center. Mississippi also ceded and the United States accepted concurrent jurisdiction over lands comprising the Columbus Air Force Base and Meridian Naval Air Station. On the premises of each of these military installations authorized personnel operate clubs, post exchanges, package stores and other similar facilities which sell packaged liquors to classes of persons delineated by military directive. These alcoholic beverages are obtained directly from distillers and suppliers located outside the State of Mississippi who ship such goods into such bases. Not only is no contention made that the consumption or use of such beverages is restricted to the military installations where purchased, but the proof shows further that: numerous classes of non military persons are authorized to make purchases; and every selling facility exacts a promise from each purchaser that he will obey the laws of the state as to such of the liquor bought as may be taken off of the installation. All of these military post facilities are operated with funds derived from dues and profits and none depends upon funds appropriated by the government of the United States.

Prior to July 1, 1966, the laws of the State of Mississippi wholly prohibited the sale or possession of alcoholic beverages in that state. On that date Missis-

sippi enacted a local option alcoholic beverage control law. *Miss. Code Ann.* §§ 10265–01, et seq (1942). This enactment imposed regulatory control over the sale of alcoholic beverages within the state in such a manner as to require all liquor purchases to be made through a state-owned warehouse. The law vested the administration of its provisions in the Alcohol Beverage Control Division of the Mississippi State Tax Commission.

This ABC Division promulgated a regulation, numbered 22 (now renumbered 30), which provides that installations selling alcoholic beverages on military reservations are to be exempted from state taxes and are given an option to order alcoholic beverages direct from the distiller, in lieu of their right under the law to make purchases from the state warehouse, but providing that in the event of the exercise of such option the direct selling distiller should collect and remit to the state the same wholesale mark-up on whiskey of 17% and on wine of 20% as charged by the state-owned warehouse.

Subsequent to the promulgation of this regulation, all distillers and suppliers of alcoholic beverages to facilities on the Mississippi bases named above collected the wholesale mark-up specified by the regulation and remitted these collections to the ABC Division of the State Tax Commission.

The plaintiff asserts that Mississippi's regulation unconstitutionally interferes with the federal procurement policy authorized by Congress and embodied in an implementing Department of Defense directive. It takes the position that Congress has conferred upon the Secretary of Defense the power to regulate the purchase, sale and use of intoxicating liquors at or

near military installations by the enactment of 50 U.S.C.A. App. § 473 which provides:

> The Secretary of Defense is authorized to make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors to or by members of the Armed Forces or the National Security Training Corps at or near any camp, station, post, or other place primarily occupied by members of the Armed Forces or the National Security Training Corps.

and that the Secretary of Defense implemented this authorization by issuing Department of Defense directive 1330.15, (32 C.F.R. § 261.1–261.5). That directive establishes department policy governing the purchase, as well as the sale, of alcoholic beverages by all components of the Armed Services through on-base outlets. Under the heading "General Policy Statements," the directive contains a subdivision entitled "Cooperation," composed of the following paragraphs:

> 1. [The Department of Defense] will cooperate with all duly constituted regulatory officials (local, state and Federal) to the degree that the duties of such officials are related to the furtherance of the terms of this Directive. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base or other place primarily occupied by members of the Armed Forces within the United States shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered, *without regard to prices locally established by state statute or otherwise.*
>
> 2. This policy of cooperation is not to be construed or represented as an admission of any legal obligation to submit to state control. (Emphasis supplied).

On June 9, 1966, the directive was amended by deleting the italicized words in ¶ 1.

The defendants make the following contentions. Payment of the wholesale mark-up required by the ABC regulation does not unduly burden the military function. Since mark-ups were passed on to customers and no assignment has been obtained from these customers to the United States, no damage claim can be maintained by it. Congress, in enacting § 473, did not intend to confer upon the Department of Defense the right to create regulations for the *purchase* of packaged liquor contrary to state law, but rather intended only to authorize liquor sales and use regulation at or near bases. The 1966 amendment to the Department of Defense directive was intended to clarify the state's right to control prices. The federal government should not have the status of a sovereign to sell liquor since such sales are not a function of sovereignty. All federal interests were acquired at times when Mississippi law forbade the sale or possession of whiskey, and Mississippi's present regulatory statutes are merely different forms of this prohibitory enactment and still apply on all federal enclaves as to purchases by the type of organizations involved here, which operate with non-appropriated funds.

In reasoning our decision, we shall assume, without deciding, that the legislative powers vested in Congress by article I, § 8, clauses 14 & 17 and article IV, § 3, clause 2 have been exercised, through delegation to the Department of Defense, in language broad enough to preempt all state control of liquor sales prices. This assumption focuses our attention on whether the XXI Amendment forbids the exercise of this congressional power in such a manner as to authorize the sales involved in the case at bar to be consummated contrary to state law.

The procedure we are required to follow has been defined by the Supreme Court. Our analysis must give full play to each of the constitutional provisos "in the light of the other and in the context of the issues and interests at stake". *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964).

The pertinent parts of article I, § 8 of The Constitution provide that the Congress shall have power to make rules for the government and regulation of the land and naval forces and to exercise exclusive legislative authority over all territories purchased with the consent of a state for an armed forces base. Section 2 of the XXI Amendment is posed in these sparse and exact words: "The transportation or importation into any state . . . of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." It is undisputed that the law of the State of Mississippi authorizes the wholesale mark-up exactions on the liquor sales involved. We are therefore required to determine if the XXI Amendment applies, i.e. did the purchases to which the mark-up was added involve transportation of liquor into Mississippi for delivery or use therein?

We will first consider the status of such transactions by the clubs and exchanges located on Keesler Field and on the Naval CB Base. These two military establishments are enclaves over which exclusive jurisdiction has been ceded by Mississippi and accepted by the United States. These lands are to Mississippi as the territory of one of her sister states or a foreign land. They constitute federal islands which no longer constitute any part of Mississippi nor function under its control. The importation of property onto these bases for use thereon would clearly be outside the

ambit of the XXI Amendment. *Collins v. Yosemite Park Co.*, 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502 (1938); *Johnson* v. *Yellow Cab Co.*, 321 U.S. 383, 64 S.Ct. 622, 88 L.Ed. 814 (1944). For example, in the Yosemite Park case the Supreme Court opined that while the XXI Amendment had increased the state's power to deal with intoxicating liquors, it did not increase the state's jurisdiction. The court stated:

> As territorial jurisdiction over the Park was in the United States, the State could not legislate for the area merely on account of the XXI Amendment. There was no transportation into California 'for delivery or use therein.' The delivery and use is in the Park, and under a distinct sovereignty. Where exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the XXI Amendment is not applicable.

In the case before us now however, the transportation of liquor to these bases was not solely for delivery and use on the military installations. The undisputed facts show that it was acquired for the purpose of being sold to individuals for their use and consumption either on the base or in the surrounding state. *Cf. Johnson v. Yellow Cab Co., supra* at 386. The mere fact that the sales transactions took place on the military installation does not serve to insulate the club's right to purchase from the prohibition of the XXI Amendment. That Amendment replaced unworkable nationwide prohibition under the XVIII Amendment with a form of local option prohibition or control. The effect of allowing a club to import liquor into a federal enclave and sell it there for use in the surrounding state would be identical to the effect of allowing a club to establish a package liquor store in a civilian shopping center near the military station. Both such liquor sales schemes would be subject to state law.

A fortiori, the liquor sales made on the two bases over which the federal and state governments exercise concurrent jurisdiction—Meridian and Columbus—are similarly subject to Mississippi law. Lands which are ceded and accepted with concurrent jurisdiction reserved to the state do not become federal enclaves within the state. Contrary to the situation that exists where exclusive federal jurisdiction cessions are made, such concurrently governed lands remain a part of state territory, subject only to the unblemished authority vested in the federal government to carry out the exclusively federal functions for which the areas were acquired. This reasoning finds firm support in the simultaneously decided milk regulation cases of *Pacific Coast Dairy v. Dept. of Agriculture of California,* 318 U.S. 285, 63 S. Ct. 628, 87 L. Ed. 761 (1943), and *Penn Dairies v. Milk Control Commission of Pennsylvania,* 318 U.S. 261, 63 S. Ct. 617, 87 L. Ed. 748 (1943). In *Penn Dairies* the Court held a state milk control commission could fix milk prices for contracts made within an Army encampment that was under the state's concurrent jurisdiction, even though the milk purchased was for military use. The *Pacific Coast Dairy* decision reached just the opposite result—no right of state price control—because the contracts there were made and the milk sales transactions occurred on an enclave exclusively regulated by the federal government. Except for the concurrent and exclusive jurisdictional features of the bases involved, the facts in these cases were identical. Thus, as to the concurrent jurisdiction bases, the liquor sales transactions occurred within the jurisdiction of the State of Mississippi, even where the consumption or other use of the liquor was consummated within the territorial confines of the base.

We do not attempt to say that Congress holds less than exclusive legislative authority over a military base ceded and accepted on a concurrent jurisdictional grant. Article I, § 8, clause 17, as interpreted by *Paul* v. *United States,* 371 U.S. 245, 263, 83 S.Ct. 426, 9 L.Ed. 2d 292 (1943), *Penn Dairies* v. *Milk Control Commission, supra* and *Pacific Coast Dairy* v. *Dept. of Agriculture, supra,* make that right clear. No assertion of power by a state can detract from the federal government's single undivided constitutional power over such a composite federal-state area, except in the instance of the state's constitutional prerogative to enact binding legislation concerning liquor delivered to and used on such a base. This exception obtains, not by dint of state power alone, but rather because the Constitution itself has been amended to make it so. It is the power which flows through the XXI Amendment to operate on the facts in the case at bar that serves to distinguish this case from the milk regulations involved in *Paul* and *Pacific Coast Dairy.*

It is now well-established that while the XXI Amendment does not abrogate the commerce clause, it does limit the ambit of the power of the United States thereunder to the extent of forbidding it to use the commerce clause as a justification for importing intoxicating liquor into a state for delivery and use therein in violation of the laws of the state. *State Board of Equalization* v. *Young's Market Co.,* 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38 (1936); *Ziffrin, Inc.* v. *Reeves,* 308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 128 (1939); *Carter* v. *Commonwealth of Virginia,* 321 U.S. 131, 64 S.Ct. 464, 88 L.Ed. 605 (1944). While we recognize that the Amendment operates only as a prohibition on power to violate state legislation which regulates intrastate use and distribution and does not

serve to extend the laws of the state to reach conduct beyond its borders, *United States* v. *Frankfort Distilleries,* 324 U.S. 293, 65 S.Ct. 661, 89 L.Ed. 951 (1945), the case here involves an assertion of federal power which, in and of itself, violates the Amendment. This cannot be permitted for it would render impossible any harmonious interpretation of the constitutional document as a whole. *Hostetter* v. *Idlewild Bon Voyage Liquor Corp., supra,* and *Joseph E. Seagram & Sons, Inc.* v. *Hostetter,* 384 U.S. 35, 86 S.Ct. 1254, 16 L.Ed. 2d 366 (1966). *Cf. Barnett* v. *Bowles,* 151 F.2d 77 (Emergency Ct. App. 1945); *Dowling Bros. Distilling Co.* v. *United States,* 153 F.2d 353 (6th Cir. 1946). In *Barnett* the court approved the imposition of pricing controls on unlawful liquor sales within the State of Mississippi at a time when the laws of the state totally prohibited commerce in such a commodity. The court, however, was careful to point out "The Emergency Price Control Act does not authorize or purport to authorize the sale or transportation or importation for delivery or use of intoxicating liquors into any state in violation of state laws. We find here no conflict in the operation of state and national regulation of intoxicating liquors."

Our decision that the XXI Amendment makes Mississippi law applicable to these transactions makes it unnecessary for us to decide such matters as whether the ambit of the enabling statute will support the Department of Defense regulation, the meaning of the 1966 amendment to those regulations, whether the method of payment followed by the clubs and exchanges here amounted to unrecoverable voluntary payments, the effect of Mississippi's enactment of its ABC law on the prior cessions to the federal government, the effect of the non-appropriated fund status

of these organizations, or whether an assignment of right by individual purchasers or club members to the United States would be a prerequisite to the maintenance of this action. Since our opinion is placed on a basis relating solely to territorial jurisdiction it is also unnecessary to analyse the respective federal and State interests at stake in operating clubs and post exchanges vis-a-vis highway safety and other civilian community problems.

The defendants are entitled to summary judgment on all issues.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

(Civil Action No. 4554)

UNITED STATES OF AMERICA, PLAINTIFF
v.
STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL, DEFENDANTS

Filed March 24, 1972, Southern District of Mississippi.

ROBERT C. THOMAS, *Clerk.*

SPECIAL CONCURRING OPINION

I share the views so well expressed by Judge Clark in the opinion in chief in the captioned case, but feel impelled to inject my thoughts on some principles additionally involved and of controlling effect in this case. A voluntary payment may not be recovered in any suit at law as a universal principle of American jurisprudence. A mere protest is not sufficient to change that principle. Where the payer is not in custody, or his property is not seized, or potentially capable of being seized by a payee, and no principle of coercion or duress exists, a payment is voluntary and cannot be recovered even though the payer protests the payment, and even though the payer knows the facts and actually believes that he owes the payee nothing.

VOLUNTARY PAYMENT

A voluntary payment by a person not then a debtor may not be recovered back. There is no evidence in this record before the Court to show aught but that these payments of these overriding percentages on liquor and wine were made by these clubs to get these alcoholic beverages without sales tax as authorized by 4 U.S.C.A. § 105 and at a specially reduced rate on wine. This is not a claim for a refund of a payment made under any kind of fraud or duress of person or property, but such payment in each instance was made initially to secure the sale and delivery of these alcoholic beverages from the manufacturer upon such payment to it of the markup price in another state.

As to such a payment, *Richfield Oil Corporation v. United States,* (9CA) 248 F.2d 217, 223 says: "The mere fact that payment was made under express protest, is not sufficient to prevent the payment from being a voluntary one which cannot be recovered back. As stated in Pure Oil Co. v. Tucker, 8 Cir., 164 F.2d 945, 947: 'It is a universally recognized rule that money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered back on the ground that the claim was illegal, or that there was no liability to pay in the first instance. This is true even though the payor makes the payment * * * under protest * * *.'"

Likewise, in *United States v. Eastport Steamship Corporation,* (2CA) 255 F.2d 795 it is said that in the absence of fraud or duress or mistake of fact, or a reservation agreement, that a party cannot pay a claim and later sue to recover the amount paid, but that the doctrine is applicable only when the recovery is sought

of a sum previously paid. See *Cooperative Refinery Association v. Consumers Public Power District,* 190 F. 2d 852; *Strimling v. Stone,* 193 F.2d 990; *Bowles v. J.J. Schmitt & Co.,* 170 F.2d 617.

In Mississippi a party cannot recover money voluntarily paid with a full knowledge of all of the facts, although no obligation to make such payment existed. *Oscar Hope v. S. W. Evans,* Smedes & Marshall Chancery (1843) 195.

As a general rule, a voluntary payment with full knowledge of the facts cannot be recovered. *Town of Wesson v. Collins,* 18 So. 360; *McLean v. Love,* 157 So. 361. That rule applies as well in equity as to law. *O. C. Tiffany & Co. v. Johnson & Robinson,* 27 Miss. 227. Payment is voluntary where there is no duress or necessity of making payment to free person or property from legal restraint. *Schmittler v. Sunflower County,* 125 So. 534, Suggestion of Error overruled 126 So. 39. The Court in *Schmittler* said: "A payment is voluntary in the sense that no action lies to recover back the amount, not only where it is made willingly and without objection; but in all cases where there is no compulsion or duress nor any necessity of making the payment as a means of freeing the person or property from legal restraint or a grasp of legal process."

In *Security Nat. Bank of Watertown, S.D. v. Young, County Treasurer, et al,* (8CA) 55 F.2d 616, 619, certiorari denied 52 S.Ct. 502 provides: "True, it is alleged that the taxes were paid under protest, but this is not sufficient to save the payment from being voluntary in the sense which bars a recovery of the taxes paid, if it was not made under any duress, compulsion, or threats, or under the pressure of process immediately available for the forcible collection of the tax. Railroad Co. v. Dodge County Commissioners, 98 U.S. 541, 25 L. Ed. 196; Gaar, Scott & Co.

v. Shannon, 223 U.S. 468, 32 S.Ct. 236, 56 L. Ed. 510; United States v. New York & Cuba Mail S.S. Co., 200 U. S. 488, 26 S.Ct. 327, 50 L. Ed. 569; Chesebrough v. United States, 192 U. S. 253, 24 S. Ct. 262, 48 L. Ed. 432."

In *Dennehy v. McNulta,* (7CCA) 86 Fed. 825, the Court said the goods were legitimate subjects of trade and there was no illegality in the nature or the character of purchase. On the contrary, his purchase, so far as appears, was in exact compliance with both his expectations and his bargain. The Court said: "There can be no recovery of money so paid, for the reason that no actual duress is shown, and no element exists to make the payment involuntary or compulsory." *Radich v. Hutchins,* 95 U.S. 210, 213; *Lonergan v. Buford,* 13 S.Ct. 684. In *Radich,* the Court said: " 'To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary, * * * there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving payment, over the person or property of another, from which the latter has no other means of immediate relief than by making the payment. As stated by the court of appeals of Maryland, the doctrine established by the authorities is that 'a payment is not to be regarded as compulsory, unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid.' Mayor, etc., v. Lefferman, 4 Gill, 425; Brumagim v. Tillinghast, 18 Cal. 265; Mays v. Cincinnati, 1 Ohio St. 268.' In the case at bar neither the persons nor the property of the purchaser were within the physical control of the sellers when the contract of purchase were entered into, or when the payments were

made thereupon, and in the eye of the law the transactions were voluntary."

In *Putnam Tool Company* v. *United States,* 147 F. Sup. 746, United States Court of Claims, certiorari denied 78 S. Ct. 33 provides: "We think that the plaintiff's payment to the government was a voluntary payment, in the legal sense, and that it cannot recover a part of it in this suit. * * * One cannot, in the absence of fraud or duress or mistake of fact or reservation agreement, or, perhaps, other special circumstances, pay a claim and later sue to recover the amount paid. The plaintiff alleges, as we have said, that there was compulsion upon it which caused it to pay the claim." The compulsion involved was interest on a large indebtedness. The court said that "the fact that interest will or may accrue upon a claim, if it is not paid, is not legal duress which will make its payment recoverable."

In *United States* v. *Eastport Steamship Corporation,* (2CA) 255 F.2d 795 provides: "Under the doctrine of voluntary payment 'One cannot, in the absence of fraud or duress or mistake of fact or reservation agreement, or, perhaps, other special circumstances, pay a claim and later sue to recover the amount paid.' The doctrine is applicable only when recovery is sought of a sum previously paid. *McKnight* v. *United States,* 1878, 98 U.S. 179 25. L.Ed. 115, affords an excellent illustration. In that case the Government had paid a sum of money to the assignees of a contractor to whom the Government was indebted. Subsequently, replying upon the undisputed invalidity of the assignment, the Government sought to recover the amount paid. Recovery was denied on the ground of voluntary payment."

In *Little* v. *Bowers, Comptroller,* 10 S.Ct. 620, 621: "In *Wabaunsee Co.* v. *Walker,* 8 Kan. 431, cited with

approval in *Lamborn* v. *Commissioners,* 97 U.S. 181, and also in *Railroad Co.* v. *Commissioners,* 98 U.S. 541, 543, it was said: 'Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed to be voluntary, and cannot be recovered back. And the fact that the party, at the time of making the payment files a written protest, does not make the payment involuntary.' "

In *United States* v. *William Edmondston,* 21 S.Ct. 718, 722 provides: " 'This is not a case of an order or direction for the payment of these moneys, given to Mr. Van Buren by the officers of the Treasury or State Department; nor is it a case where the failure to pay the moneys might be regarded as disobedience to the peremptory order of a superior officer; nor a payment under duress. The facts show nothing but a voluntary payment of money to the government, without claim of any right to retain one penny of it.' It is clear from these references that this court has distinctly and constantly recognized the doctrine that where there has been a voluntary payment of money, using that term in its customary legal sense, the money so paid cannot be recovered, and also that that doctrine applies to cases in which one of the parties is the government, and that money thus voluntarily paid to the government cannot be recovered."

In *United States v. New York & Cuba Mail Steamship Co.,* 26 S.Ct. 327, 329: "And, expressing the principle to be applied, the court said, in the Chesebrough Case, 24 S.Ct. 262, 'even a protest or notice will not avail if the payment be made voluntarily, with full knowledge of all the circumstances, and without any

coercion by the actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than such payment.'" * * * "It is stated in Union P.R. Co. v. Dodge County, 98 U.S. 541, 25 L. ed. 196, and quoted from that case in Little v. Bowers, 134 U.S. at page 554, 33 L. ed. at page 1019, and 10 Sup. Ct. Rep. at page 621, as follows: 'Where a party pays an illegal demand, with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back.'"

THE UNITED STATES IS NOT A PREFERRED LITIGANT

The funds sought to be recovered belong to the members of service clubs on United States bases in Mississippi. None of it was derived, or made possible by any appropriation of public money. The United States by statute has the right to sue therefor just as would the club itself, but it has no preferential advantage as a litigant over the real party in interest. The Supreme Court of the United States many years ago said that the United States as a litigant appears in its own court with the same rights and the same responsibilities as the humblest litigant.

In *Lacy* v. *United States,* (5CA) 216 F.2d 223, 225 says: "The Government when applying for relief in a court of equity is as much bound to do equity as is a private litigant. United States v. Belt, D.C., 47 F. Supp. 239, vacated 319 U.S. 521, 63 S.Ct. 1278, 87

L.Ed. 1559, affirmed 79 U.S.App.D.C. 87, 142 F.2d 761; United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 338, 26 S.Ct. 282, 50 L.Ed. 499; Daniell v. Sherrill, Fla., 48 So.2d 736, 737, 23 L.R.A.2d 1410. 'When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter.' Luckenbach S.S. Co. Inc. v. The Thekla, 266 U.S. 328, 339, 340, 45 S.Ct. 112, 113, 69 L.Ed. 313."

In *United States* v. *Maryland Casualty Company*, (5CA) 235 F.2d 50, 53 says: "Beseeching the Court on equitable terms for leave to intervene, the Government is and ought to be treated as would be any other suitor, for '* * * when government invokes the aid of the court as a litigant it stands as any other litigant * * *', Jones v. Watts, 5 Cir., 142 F.2d 575, 577, 163 A.L.R. 240, certiorari denied 323 U.S. 787, 65 S.Ct. 310, 89 L.Ed. 628; In re Minot Auto Co., 8 Cir., 298 F. 853, 857."

In *Guaranty Trust Co. of New York v. United States,* 58 S.Ct. 785 says: "Even the domestic sovereign by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident of that act. Luckenbach S.S. Co. Inc. v. The Thekla, 266 U.S. 328, 340, 341, 45 S.Ct. 112, 113, 69 L.Ed. 313; United States v. Stinson, 197 U.S. 200, 205, 25 S.Ct. 426, 49 L.Ed. 724; The Davis, 10 Wall. 15, 19 L.Ed. 875; The Siren, 7 Wall. 152, 159, 19 L.Ed. 129. As in the case of the domestic sovereign in like situation, those rules, which must be assumed to be founded on principles of justice applicable to individuals, are to be relaxed only in response to some persuasive demand of public policy generated by the nature of the suitor or of the claim which it asserts."

91 C.J.S. 420 teaches: "The rights of the United States are ordinarily measured by the same rules as those of a private litigant."

This Is Not a Suit For a Debt Owing to the United States

This is a suit which the United States has a right to bring as a sovereign under the circumstances, but it is not the real party in interest in such funds, and if recovered, will not be covered into the general fund of the United States Treasury. Not one dime of this money ever come from public revenue.

Although the United States has the right to sue the employer under the wage and hour law to recover back wages due according to the act, it cannot be said that the debt is one due the United States within the meaning of 31 U.S.C.A. § 191 and, therefore, entitled to priority under the bankrupt act. *Nathanson* v. *National Labor Relations Board,* 73 S.Ct. 80, 82 the Court said: "It does not follow that because the board is an agency of the United States, any debt owed it is a debt owing the United States within the meaning of R.S. § 3466." The Court further said: "There is no function here of assuring the public revenue. The beneficiaries of the claims are private persons as was the receiver in *American Surety Co. v. Akron Savings Bank,* 212 U.S. 557, 29 S.Ct. 686, 53 L.Ed. 651."

These Clubs Were Acually Subject to the State Sales Tax

But they procured an exemption from the state sale tax on hard liquor and wine and mixed drinks very much to their advantage by this contractual arrangement which allowed them the privilege of buying their alcoholic beverages outside Mississippi with a

specified markup price considered fair by the parties at the time. The fact that these clubs contemplated operation upon government enclaves provided no exemption, and particularly when the government itself had no responsibility therefor.

In *James, as State Tax Commissioner of West Virginia* v. *Dravo Contracting Co.*, 302 U.S. 134, 58 S.Ct. 208, 218: "In Union P. Railroad Co. v. Peniston, 18 Wall. 5, 33, 36, 21 L.Ed. 787, the Court said: 'It may, therefore, be considered as settled that no constitutional implications prohibit a State tax upon the property of an agent of the government merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the States in the collection of their necessary revenue without any corresponding advantage to the United States.'"

THE TRANSACTIONS IN SUIT OCCURRED AND THE FUNDS ACCRUED NOT ON ANY ENCLAVE IN MISSISSIPPI, BUT OUTSIDE MISSISSIPPI IN EACH INSTANCE

There is no statute or decision which exempts these bases from these arrangements whereby they purchased these alcoholic beverages in other states from these wholesalers at an agreed markup price to the wholesalers. It was the wholesaler and not the clubs that paid these markup prices to the State Tax Commission in exchange for the right to sell these products in other states for resale in Mississippi.

In *Pacific Coast Dairy, Inc. v. Department of Agriculture of California, et al*, 63 S.Ct. 628, the dairy sold milk to the Quartermaster's Department at Moffett Feld at less than the minimum price fixed for the area. Congress refused to authorize the Armed Services to refuse bids for milk below the California Milk Stabiliza-

tion Law price. Moffett Field operated under the exclusive jurisdiction of the government. The exclusive character of jurisdiction at Moffett Field is conceded. The Court said that contracts to sell and sales consummated within the enclave cannot be regulated by California law. The Court observed that on this day in *Penn Dairies v. Milk Control Commission,* 63 S.Ct. 617, that a different decision is required where the contract and sales occur within a state's jurisdiction, absent specific national legislation excluding the operation of the state's regulatory laws. The Congress has the power to protect its exclusive jurisdiction on the enclave but not elsewhere unless expressly so provided.

Accordingly, for the reasons stated in the opinion in chief and for the additional reasons stated herein, the complaint in this case is without merit and should be dismissed with prejudice without any assessment of costs.

HAROLD COX,
U.S. District Judge.

March 20, 1972.

APPENDIX B

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

(Civil Action No. 4554)

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL., DEFENDANTS

Filed March 30, 1972, Southern District of Mississippi.

ROBERT C. THOMAS, *Clerk.*

JUDGMENT

For the reasons stated in the opinions of the Court, incorporated herein and made a part hereof by reference thereto, the complaint in the captioned case is without merit and is hereby dismissed with prejudice without any assessment of costs.

Ordered, adjudged and decreed, this March 27th, A.D., 1972.

CHARLES CLARK,
U.S. Circuit Judge.
DAN M. RUSSELL, JR.,
U.S. District Judge.
HAROLD COX,
U.S. District Judge.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

(Civil Action No. 4554)

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ARNY RHODEN, CHAIRMAN; JIMMIE WALKER, EXCISE COMMISSIONER; WOODLEY CARR, AD VALOREM COMMISSIONER; KENNETH STEWART, DIRECTOR OF THE ALCOHOLIC BEVERAGE CONTROL DIVISION, MISSISSIPPI STATE TAX COMMISSION; A. F. SUMMER, ATTORNEY GENERAL, STATE OF MISSISSIPPI; AND THE STATE OF MISSISSIPPI, DEFENDANTS

Filed May 1, 1972, Southern District of Mississippi.
ROBERT C. THOMAS, *Clerk*.

NOTICE OF APPEAL

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on January 30, 1972.

This is an appeal from a final judgment in a civil action required by Section 2281, Title 28, United States Code, to be heard by a district court of three

judges and this appeal is being taken under the provisions of Section 1253, Title 28, United States Code.

ROBERT E. HAUBERG,
U.S. Attorney.
By JOSEPH E. BROWN, Jr.,
Assistant U.S. Attorney.

Attorney for the United States of America, Post Office Box 2091, Jackson, Mississippi 39205.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

(Civil Action No. 4554)

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ARNY RHODEN, CHAIRMAN; JIMMY WALKER, EXCISE COMMISSIONER; WOODLEY CARR, AD VALOREM COMMISSIONER; KENNETH STEWART, DIRECTOR OF THE ALCOHOLIC BEVERAGE CONTROL DIVISION, MISSISSIPPI STATE TAX COMMISSION; A. F. SUMMER, ATTORNEY GENERAL, STATE OF MISSISSIPPI, AND THE STATE OF MISSISSIPPI, DEFENDANTS

STIPULATION OF FACTS BETWEEN PLAINTIFF UNITED STATES OF AMERICA AND DEFENDANTS STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.

The plaintiff United States of America and defendants State Tax Commission of the State of Mississippi, et al., herein stipulate that the following facts are true and correct, without prejudice to the right of any party to object to any of said facts as incompetent, immaterial or irrelevant evidence in this case:

1. Keesler Air Force Base, the United States Naval Construction Battalion Center, Columbus Air Force Base, and the Meridian Naval Air Station are located in the State of Mississippi.

2. The four bases were purchased by the United States with the consent of the State of Mississippi.

3. The lands comprising Keesler Air Force Base at Biloxi and the United States Naval Construction Battalion Center at Gulfport, Mississippi were acquired in the following manner:

(a) *Keesler Air Force Base.* The main base, which comprises 1,061.92 acres, was acquired as follows: 717.20 acres by letter to Governor Fielding L. Wright from Harold C. Stuart, Assistant Secretary of the Air Force, dated April 19, 1950, and acknowledged April 24, 1950 (Exhibit 1); 344.72 acres by general blank letters of acceptance as follows: (1) letter to Governor Thomas L. Bailey from Henry L. Stimson, Secretary of War dated January 9, 1945, and acknowledged January 15, 1945 (Exhibit 2); (2) letter to Governor Thomas L. Bailey from Henry L. Stimson, Secretary of War, dated May 12, 1944, and acknowledged May 15, 1944 (Exhibit 3); (3) letter to Governor Paul B. Johnson from Henry L. Stimson, Secretary of War, dated May 26, 1943 and acknowledged June 1, 1943 (Exhibit 4).

(b) *U.S. Naval Construction Battalion Center.* The lands were acquired by Declaration of Taking filed by the Secretary of the Navy in the District Court of the United States for the Southern Division of the Southern District of Mississippi, as follows: (1) *United States of America* v. *911.50 acres, more or less, in Harrison County, Mississippi, G. B. Dantzler, et al.,* Civil No. 216, filed on April 30, 1942. Jurisdiction over this property was accepted on behalf of the United States by letter to Governor Paul B. Johnson from James Forrestal, Secretary of the Navy, dated December 14, 1942, and acknowledged December 29, 1942 (Exhibit 5); (2) *United States of America* v. *2.4 acres of land, more or less, in Harrison County,*

Mississippi, Mrs. Anna J. Ott, et al., Civil No. 224, filed on November 6, 1942. Jurisdiction over this land was accepted on behalf of the United States by letter to Governor Paul B. Johnson from James Forrestal, Secretary of the Navy, dated December 14, 1942 and acknowledged December 29, 1942 (Exhibit 6). (3) *The United States of America* v. *223 acres of land in Harrison County, Mississippi, Mrs. Gladys Finston, et al.,* Civil No. 285, filed on May 5, 1943. Jurisdiction was accepted by letter to Governor Dennis Murphree from Ralph A. Bard, Assistant Secretary of the Navy, dated January 6, 1944 and acknowledged January 9, 1944 (Exhibit 7).

4. Mississippi ceded to the United States and United States accepted concurrent jurisdiction over the lands comprising the Columbus Air Force Base and the Meridian Naval Air Station.

5. The Officers' Open Mess, Noncommissioner Officers' Open Mess, and the Airmen's Club of Keesler Air Force Base; the Officers' Open Mess and Noncommissioned Officers' Open Mess of Columbus Air Force Base; the Commissioned Officers' Mess—closed, Chief Petty Officers' Mess—open, Navy Exchange Enlisted Men's Club of the United States Naval Construction Battalion Center; and the Chief Petty Officers' Mess—open, the Commissioned Officers' Mess—closed, the Commissioned Officers' Mess—open, the Navy Exchange Enlisted Men's Club, and the Centralized Package Store at Meridian Naval Auxiliary Air Station are all nonappropriated fund instrumentalities established in accordance with the pertinent regulations of the Air Force and the Navy.

6. Section 6 of the 1951 Amendments to the Universal Military Training and Service Act (50 U.S.C. App. 473) reads as follows:

> The Secretary of Defense is authorized to make such regulations as he may deem to be

appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors to or by members of the Armed Forces or the National Security Training Corps at or near any camp, station, post, or other place primarily occupied by members of the Armed Forces or the National Security Training Corps. Any person, corporation, partnership, or association who knowingly violates the regulations which may be made hereunder shall, unless otherwise punishable under the Uniform Code of Military Justice, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000 or imprisonment for not more than twelve months, or both.

7. On May 4, 1964, the Secretary of Defense issued Department of Defense Directive 1330.15, which reads as follows:

Subject: Alcoholic Beverage Control.

References:

(a) Section 6, 1951 Amendments to the Universal Military Training and Service Act, 50 U.S.C. App. 473.

(b) DoD Directive 1330.1, "Regulations for the Control of Alcoholic Beverages," December 17, 1953 (hereby cancelled).

(c) DoD Instruction 4175.2, "Purchase of Distilled Spirits for Resale by Military Installations which are Located in Monopoly States," April 19, 1956 (hereby cancelled).

I. AUTHORITY AND PURPOSE

Under the authority contained in reference (a) this Directive assigns responsibility and establishes uniform Department of Defense policy governing the sale of alcoholic beverages.

II. APPLICABILITY AND SCOPE

The provisions of this Directive apply to all DoD components and to all persons eligible to patronize on-base outlets selling alcoholic beverages in the United States and the District of Columbia.

III. RESPONSIBILITY

A. OFFICE OF THE SECRETARY OF DEFENSE

The Assistant Secretary of Defense (Manpower) (ASD(M)) shall be responsible for the administration of this Directive throughout the DoD.

B. MILITARY DEPARTMENTS

The Secretaries of the Military Departments shall be responsible for effectively carrying out the policies of this Directive and to make and issue implementing regulations in accordance with existing applicable laws.

IV. GENERAL POLICY STATEMENTS

A. USE OF ALCOHOLIC BEVERAGES

The established policy of the Department of Defense with respect to controlling the use of alcoholic beverages by members of the Armed Forces is to encourage abstinence, enforce moderation, and punish over-indulgence. This policy can be carried out most effectively through command supervision.

B. RESTRICTIVE CONTROLS AND AFFIRMATIVE MEASURES

1. Restrictive controls shall be established by Secretaries of the Military Departments which recognize (as the primary consideration) the varying conditions and requirements of military service, yet do not discriminate against individuals in the Armed Forces by

denying them the rights and privileges of other citizens.

2. Affirmative measures shall be taken, including but not limited to providing (a) character guidance, with emphasis on the harmful effects of the immoderate use of alcoholic beverages, using the advice and assistance of chaplains, and (b) wholesome recreation, entertainment, and relaxation for individuals in the Armed Forces both on and off station, using the initiative and assistance of local communities and national organizations.

C. COOPERATION

1. DoD will cooperate with all duly constituted regulatory officials (local, state and Federal) to the degree that the duties of such officials are related to the furtherance of the terms of this Directive. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base or other place primarily occupied by members of the Armed Forces within the United States shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered, without regard to prices locally established by state statute or otherwise.

2. This policy of cooperation is not to be construed or represented as an admission of any legal obligation to submit to state control.

V. AUTHORIZED SALES

A. OTHER THAN PACKAGED ALCOHOLIC BEVERAGES

Appropriate regulations controlling the sale of alcoholic beverages dispensed by the drink, or beer sold in other than sales outlets for pack-

aged alcoholic beverages, may be promulgated by the Secretaries of the Military Departments.

B. SALES OUTLETS FOR PACKAGED ALCOHOLIC BEVERAGES

The sale of packaged alcoholic beverages, other than beer, may be authorized on military installations when the Secretary of a Military Department approves the establishment of such sales outlets after determining that the authorization will be beneficial to the morale of the military community.

1. In arriving at such determinations, the Secretary of a Military Department will take cognizance of all pertinent factors including the following criteria as applicable:

(a) Estimated number of authorized patrons per outlet if granted.

(b) Importance of estimated contributions of package store profits to providing, maintaining and operating clubs, messes and other recreational activities.

(c) Availability of wholesome family social clubs to military personnel in the local civilian community.

(d) Geographical inconveniences.

(e) Limitations of non-military sources.

(f) Disciplinary and control problems due to restrictions imposed by local law and regulation.

(g) Highway safety.

(h) A digest of the attitudes of community authorities or civic organizations toward establishment of a package sales outlet.

2. An information copy will be dispatched to the ASD (M) of each action approving the establishment of sales outlets for packaged alcoholic beverages, including the determinations and findings made in accordance with the criteria as stated above.

3. Controls

(a) Purchase and consumption

Although individual rationing will not be required, installation commanders will maintain a continuing review of the amount of alcoholic beverages purchased in the sales outlets and the number of authorized purchasers. If such review indicates that the purchases equated to the number of authorized individuals results in an excessive per capita amount, appropriate control measures will be instituted to assure compliance with Section IV.A or V.B.3.c. as applicable.

(b) Pricing

Prices in authorized sales outlets for packaged alcoholic beverages shall be within ten per cent (10%) of the lowest prevailing rates of civilian outlets in the area. Exceptions will be granted only upon approval by the Secretary of the cognizant Military Department upon a substantiated showing, to be made in each case, that special factors warrant an exception thereto.

(c) Diversion

Diversion, to unauthorized persons of packaged alcoholic beverages purchased by members of the Armed Forces in authorized sales outlets, is a serious offense and where substantiated will be punished.

4. Eligibility for patronage of sales outlets

Eligibility for patronage of sales outlets for alcoholic beverages on military installations will be restricted to authorized personnel prescribed by the Secretaries of the Military Departments.

VI. IMPLEMENTATION

Within thirty (30) days from the date of this Directive, the Secretaries of the Military Departments shall submit to the ASD (M) for approval their proposed implementing regulations.

VII. CANCELLATIONS

References (b) and (c) are cancelled.

8. On June 9, 1966, the following change 1 to Directive 1330.15 was issued:

The following pen change to DoD Directive 1330.15, 'Alcoholic Beverage Control,' May 4, 1964, has been authorized, *effective immediately*:

PEN CHANGE to *Page 2, Section IV.C.1:* Delete the last clause reading as follows: 'without regard to prices locally established by state statute or otherwise.'

9. The following memoranda and letter are certified true copies from the official files of the Department of Defense relating to said Directive of June 9, 1966:

(a) Memorandum For Secretaries of the Military Departments from Thomas D. Morris, Assistant Secretary of Defense (Manpower), dated April 15, 1966 (Exhibit 8);

(b) Memorandum For: Assistant Secretary of Defense (Manpower) from Robert H. B. Baldwin, Under Secretary of the Navy, dated April 22, 1966 (Exhibit 9);

(c) Memorandum For: Assistant Secretary of Defense (Manpower) from Arthur W. Allen, Jr., Deputy Under Secretary of the Army (Manpower), dated April 26, 1966 (Exhibit 10);

(d) Memorandum For The Assistant Secretary of Defense(Manpower) from Norman S. Paul, Under Secretary of the Air Force, dated April 26, 1966 (Exhibit 11);

(e) Memorandum for Mr. Morris from Stephen S. Jackson, dated May 3, 1966 (Exhibit 12);

(f) Memorandum for The Deputy Secretary of Defense from Thomas D. Morris, dated June 8, 1966 (Exhibit 13);

(g) Memorandum For The Assistant Secretary of Defense (Administration) from the Deputy Secretary of Defense, dated June 9, 1966 (Exhibit 14);

(h) Letter to Mr. Charles B. Buscher, Executive Director, National Alcoholic Beverage Control Association, from Thomas D. Morris, dated June 27, 1966 (Exhibit 15).

10. Mississippi's Local Option Alcoholic Beverage Control Law, Mississippi Code (1942) Annotated, Section 10265–01 *et seq.*, enacted July 1, 1966, a true copy of which is attached hereto as Exhibit 16, imposes regulatory control of alcoholic beverages within the State and vests the administration of these provisions in the Alcoholic Beverage Control Division of the Mississippi State Tax Commission.

11. The Alcoholic Beverage Control Division promulgated Regulation No. 22, entitled "Sales to Military Post Exchanges, etc., Effective September 1, 1966", which reads as follows:

REGULATION No. 22

SALES TO MILITARY POSTS EXCHANGES, ETC. EFFECTIVE SEPTEMBER 1, 1966

Post Exchanges, Ship Stores and Officers Clubs located on military reservations and oper-

ated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller, or by making purchases from the Alcoholic Beverage Control Division of the State Tax Commission. In the event that an order is placed by such organization directly with a distiller a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.

All orders of such organization shall bear the usual wholesale mark up in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller which shall in turn remit the wholesale mark up to the Alcoholic Beverage Control Division of the State Tax Commission.

The wholesale mark up on distilled spirits is 17%. The wholesale mark up on wine is 20%. This was reissued, without substantial change in content, as Regulation No. 30, dated September 14, 1970.

12. The nonappropriated fund instrumentalities enumerated in Paragraph 6, hereof, elected to purchase all of their alcoholic beverages directly from distillers or suppliers. Under protest, but pursuant to Regulation No. 22 (now Regulation No. 30), they paid the aforementioned markups to the distillers and/or suppliers, and said distillers and/or suppliers collected the markups and remitted them directly to the Mississippi Alcoholic Beverage Control Division.

13. The Alcoholic Beverage Control Division maintains a wholesale warehouse for the distribution of alcoholic beverages as a service to purchasers. The wholesale services and facilities are available both to the military and other purchasers. The Division is required by law to maintain these facilities whether they are utilized or not. In instances where the nonappropriated fund instrumentalities listed in Para-

graph 6, hereof, make purchases of alcoholic beverages direct from distillers located outside the State of Mississippi with shipment being made direct to said organizations, the Division does not transport, store, distribute or perform any other direct service connected with the purchases.

14. By letter dated May 23, 1967 addressed to "All Firms Selling Alcoholic Beverages to the State of Mississippi," the Mississippi Alcoholic Beverage Control Division informed such firms as follows:

> Subject: Sales to Military Post Exchanges, Ship Stores and Officers Clubs.
>
> You are hereby advised that the following Regulation issued under authority granted by HB 112, laws of 1966, *has not been suspended or amended,* therefore, all provisions remain in force and shall be strictly adhered to:
>
> REGULATION No. 22
>
> SALES TO MILITARY POST EXCHANGES,ETC.
>
> EFFECTIVE SEPTEMBER 1, 1966
>
> Post Exchanges, Ship Stores and Officers Clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller, or by making purchases from the Alcoholic Beverage Control Division of the State Tax Commission. In the event that an order is placed by such organization directly with a distiller a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.
>
> All orders of such organization shall bear the usual wholesale mark up in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller which shall in turn remit the wholesale mark up to the

Alcoholic Beverage Control Division of the State Tax Commission.

The wholesale mark up on distilled spirits is 17%. The wholesale mark up on wine is 20%."

Any supplier who fails or refuses to strictly observe the above Regulation shall be considered as having violated the Alcoholic Beverage Control laws of Mississippi and promptly deprived of the benefits of same; and in addition thereto may be prosecuted for violating the act and subject to the penalties set forth therein.

Submitted by:

/s/ A. V. BEACHAM, M.D.,
A. V. BEACHAM, M.D., *Director.*

cc: Commanders of Military Posts located in Mississippi

(Underscoring so in original).

15. By letter dated June 8, 1967, addressed to "Alcoholic Beverage Suppliers", on the subject of "Compliance With Alcoholic Beverage Control Regulation No. 22—Sales To Military Officers Clubs, Post Exchanges, Ships Stores, Etc.," the Mississippi Alcoholic Beverage Control Division informed such suppliers as follows:

Gentlemen: The mark-up regulatory fee required by the subject regulation must be remitted directly to this Division on the date shipments are made to the Military base. Said fee must be invoiced to the Military and collected directly from the Military (Club) or other authorized organization located on the Military base. Any supplier who ships or sells alcoholic beverages to Military organizations located within the boundaries of Mississippi without immediately remitting the fee directly to the Alcoholic Beverage Control Division of the State Tax Commission and collecting said fee directly from the said Military organization shall be in violation of the Alcoholic Beverage

Control laws and regulations issued pursuant thereto. Payments by the Military organizations into an escrow account in lieu of payment to the suppliers have not been approved by the State of Mississippi and any such payments permitted by the suppliers shall subject such suppliers to penalties as provided by law and regulations. In addition to penalties imposed by law, products presently sold by the Alcoholic Beverage Control Division *will be delisted.*

If this letter is not completely and perfectly clear we strongly suggest that you contact this office prior to accepting further orders.

Yours very truly,
/S/ A. V. BEACHAM, M.D.,
A. V. Beacham, M.D., Director,
Alcoholic Beverage Control Division,
State Tax Commission.

AVB:am
(Underscoring so in original).

16. The Alcoholic Beverage Control Division initially sought to require the said nonappropriated fund instrumentalities to obtain an alcoholic beverage permit from the Division as a condition to purchasing and selling alcoholic beverages in the State of Mississippi. After their refusal to obtain such permit, the Division made no further effort to enforce this requirement.

17. The amount of the markups paid by the affected nonappropriated fund instrumentalities to suppliers outside the State of Mississippi and remitted by them to the Mississippi Alcoholic Beverage Control Division has totalled $648,421.92 from September 1966 through July 31, 1971.

18. The following Directives, Regulations and Manuals govern the operation of the clubs and other non-

appropriated fund instrumentalities of the Air Force and Navy:

Department of Defense Directive No. 1330.15 dated May 4, 1964, as revised June 9, 1966, and applicable to the nonappropriated fund instrumentalities of all military departments (Exhibit 17);

Air Force Regulation 34–57, dated December 22, 1970, entitled, The Control of Alcoholic Beverages: Their Procurement, Sale and Use, with Change 1, dated March 25, 1971 (Exhibit 18);

Air Force Regulation 176–1, dated July 30, 1968, entitled, Nonappropriated Funds: Basic Responsibilities, Policies, and Practices, with Changes 1, 2, 3, 4, 5, 6, and 7 (Exhibit 19);

Air Force Manual 176–3, dated May 12, 1971, entitled Nonappropriated Funds: Operational Manual for Open Messes and Other Sundry Associations (Exhibit 20);

Navy regulations contained in the Manual for Messes Ashore, 1962, with Changes 1 through 6 (NAVPERS 15951) (Exhibit 21.).

19. The net profits earned by the aforesaid nonappropriated fund instrumentalities listed in Paragraph 6 of this stipulation, from the sale of alcoholic beverages for the calendar year 1969 and fiscal year 1971, and the use made thereof, were as follows:

(1) *Keesler Air Force Base:* Officers' Open Mess: 1969—$51,542.10; 1971—$12,554.78. Used for general maintenance of the club. NCO Open Mess: 1969—$55,348.55; 1971—$20,684.08. Used for general maintenance of the club and purchase of equipment.

(2) *Columbus Air Force Base:* Officers' Club: Fiscal year 1970, with beer sales included, $11,732.62; 1971—$12,654.43. Used for general maintenance of the club. NCO club: 1969—$23,241.23. Used for the general maintenance of the club. 1971—$15,864.87. Put into

special reserve fund for major improvements and decorations.

(3) *U.S. Naval Construction Battalion Center:* Commissioned Officers' Mess—closed: 1971—$1,977; Chief Petty Officers' Mess—open: 1971—$17,048. Put into clubs' reserve funds and used for additions and improvements to the clubs. Enlisted Mens' Club: 1969—$12,385; 1971—Enlisted Mens' Club (Package store), $8,113; Enlisted Mens' Club (Bar sales), $20,027. Profits were held for the club for entertainment, refurbishment and similar purposes for improving the club.

(4) *Naval Air Station, Meridian:* Enlisted Mens' Club: 1969—$12,385; 1971—Enlisted Mens' Club (Package store), $4,370; Enlisted Mens' Club (Bar sales), $12,838. Profits are held for the club for entertainment, refurbishment and similar purposes for improving the clubs; CPO Mess: 1969—$4,755.29; 1971—$6,204. Profits used to help pay wages and other mess administrative expenses; Commissioned Officers' Mess-open: 1969—$14,154.45; 1971—$8,620. Put in club's reserve fund and used for additions and improvements to the club.

21. The following Interrogatories to the Plaintiff and the Plaintiff's Answers thereto:

> "5. What, if any, reason exists why the personnel at the four military bases named in paragraph 6 of the complaint cannot supply their legitimate needs for packaged liquor by purchases from retail stores licensed by the State of Mississippi?
>
> Answer. The nature and characteristics of military service and the circumstances and conditions governing such service cause Armed Forces personnel and their families to form their own community on the military installation and to remain separated from the sur-

rounding civilian community. Members of the Armed Forces are subject to military discipline. Their place of duty assignment and hours of duty are fixed on the basis of the needs of the service and not upon personal preferences of the individual. Because they share the same outlook and the same working and living conditions, Service families look to each other and to the installation to which they are assigned for the satisfaction of their duty and off-duty needs.

The clubs, including their packaged liquor stores, furnish a necessary and important service to Armed Forces personnel and their families. They provide convenient facilities for off-duty dining, entertainment, relaxation and amusement. To the military community, they are the counterparts of similar facilities that are available to civilians in the civilian community.

Because they are conveniently located, are oriented to the special needs and circumstances of Service families, and are a particular earmark of military life, they contribute to the establishment and maintenance of Service morale and esprit de corps."

"6. What if any, reason exists why the alleged Federal instrumentalities named in paragraph 6 of the complaint cannot supply the legitimate needs of the aforesaid personnel without avoiding payment of the wholesale markup on packaged liquor required by the State of Mississippi as to all packaged liquor sold in the State?

Answer: Members of the Armed Forces are stationed at installations and transferred therefrom as the needs of the Service dictate, and not on the basis of personal preferences. Because of these circumstances, it is desirable from a morale standpoint that each installation furnish substantially similar off-duty facilities

for its military community, including clubs, packaged liquor stores, etc. This policy aids in easing the burden and inconvenience of transfers of personnel from one installation to another.

The 17 or 20 per cent wholesale mark up on liquor in Mississippi has a substantial effect on the price at which it can be sold on the installation. No other State has such a requirement. If the wholesale mark up is paid by clubs at installations in Mississippi, their resale prices would be higher than at clubs located on installations in other States throughout the country. It would be one factor which would make service at installations in Mississippi less attractive than in other States and would detrimentally affect the morale of Armed Services personnel transferring to installations in the State of Mississippi."

(s) Meyer Scolnick
MEYER SCOLNICK
Attorney for the Plaintiff, United States of America.

(s) Guy N. Rogers
GUY N. ROGERS
Assistant Attorney General for the State of Mississippi.

(s) Robert L. Wright
ROBERT L. WRIGHT
Attorney for Defendant, State Tax Commission of the State of Mississippi.

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